

ORIGINAL

VIRGINIA: IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

2003 JAN 30 PM 3:40

COMMONWEALTH OF VIRGINIA, JOHN T. FREY

Plaintiff,

v.

LEE BOYD MALVO,
A/K/A JOHN MALVO,

Defendant.

Case No. K102888

Hon. Jane Marum Roush

PRAECIPE

The Honorable Jane Marum Roush, on March 3, 2003, will hear the previously filed Consolidated Motion for Leave to Record and Telecast certain pre-trial and trial proceedings in the above-styled matter, filed by the Radio-Television News Directors Association, the Virginia Association Of Broadcasters, ABC, Inc., Cable News Network LP, LLLP, CBS Broadcasting Inc., Courtroom Television Network LLC, Fox News Network LLC, National Broadcasting Company, Inc., NEWSCHANNEL 8, WJLA-TV (Channel 7), WMAL Radio, WRC-TV (Channel 4), WTOP Radio, WTTG(TV) (Channel 5), W*USA-TV (Channel 9), the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists.

DATED: January 30, 2003

Respectfully submitted,

Radio-Television News Directors Association,

By:

Barbara Van/Gelder (pro hac vice)
Kathleen A. Kirby (pro hac vice)
M. Evan Corcoran, Va. Bar No. 32438
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WILEY REIN & FIELDING LLP
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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2003, I caused to be served, *via* first class United States mail, a copy of the foregoing Praecipe causing the Court to hear the Consolidated Motion for Leave to Record and Telecast certain pre-trial and trial proceedings, to the following persons:

Robert F. Horan, Jr.
Commonwealth's Attorney
4110 Chain Bridge Road
Fairfax, Virginia 22030

Michael S. Arif, Esq.
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CLERK, CIRCUIT COURT
FAIRFAX, VA

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Defendant.

Case No. K102888

Hon. Jane Marum Roush

**CONSOLIDATED MOTION FOR LEAVE TO
RECORD AND TELECAST PROCEEDINGS**

Pursuant to Virginia Code § 19.2-266, the Radio-Television News Directors Association ("RTNDA"), the Virginia Association Of Broadcasters, ABC, Inc., Cable News Network LP, LLLP, CBS Broadcasting Inc., Courtroom Television Network LLC, Fox News Network LLC, National Broadcasting Company, Inc., NEWSCHANNEL 8, WJLA-TV (Channel 7), WMAL Radio, WRC-TV (Channel 4), WTOP Radio, WTTG-TV (Channel 5), W*USA-TV (Channel 9), the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists (collectively, the "Movants"), respectfully move for leave to record and telecast certain proceedings in this matter. This motion has been set for hearing March 3, 2003 at 10:00 a.m. As grounds for its motion, Movants state as follows:

1. Movants are representatives of the electronic media who seek to cover certain pre-trial and trial proceedings in this case.
2. The public interest compels such coverage.
3. The October 2002 shooting deaths in Virginia, Maryland, and the District of Columbia touched the lives of a broad cross-section of citizens in this area and throughout the

nation. Granting the instant motion would allow citizens nationwide – including many who themselves are victims, as reflected in the Commonwealth’s indictment – who cannot physically attend, to have contemporaneous, complete, and objective information about the proceedings.

5. Movants seek the placement of two small, virtually silent, television cameras in unobtrusive locations in the courtroom. They would be operated in strict compliance with the guidelines of Virginia Code § 19.2-266.

6. The pooling of equipment and personnel would be coordinated through Ede Jermin of WRC-TV NBC4, who has been designated by the Virginia Association of Broadcasters as the coordinator for Fairfax County.

7. Virginia Code § 19.2-266 sets forth a tested and workable framework for the electronic broadcast of proceedings. Coverage may only be prohibited upon a finding of “good cause.” Speculative or conclusory allegations of potential prejudice to a party cannot constitute “good cause.”

8. We have repeatedly attempted to contact Commonwealth’s Attorney Robert F. Horan, Jr. seeking his consent to this motion, but he has not returned our calls. Defense counsel Michael Arif, Esq., opposes this motion.

9. A party opposing electronic coverage must demonstrate concrete evidence of prejudice that rises to the level of constitutional dimensions. No such showing can be made here.

10. The Virginia General Assembly provided specific guidelines and limitations in Virginia Code § 19.2-266 that are intended to dissipate any potential prejudice to the parties, and promote the integrity of the proceedings. In numerous cases, including capital cases, Virginia courts have allowed the television broadcast of proceedings in a manner that ensures a fair trial.

WHEREFORE, for the foregoing reasons, those contained in the accompanying memorandum of law, as well as those that may be offered at any hearing on this motion, the instant motion should be granted.

DATED: January 30, 2003

Respectfully submitted,

Radio-Television News Directors Association,
Virginia Association Of Broadcasters,
ABC, Inc.,
Cable News Network LP, LLLP,
CBS Broadcasting Inc.,
Courtroom Television Network LLC,
Fox News Network LLC,
National Broadcasting Company, Inc.,
NEWSCHANNEL 8,
WJLA-TV (Channel 7),
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the Reporters Committee for Freedom of the Press,
and the Society of Professional Journalists.

By:

Barbara Van Gelder (*pro hac vice*)
Kathleen A. Kirby (*pro hac vice*)
M. Evan Corcoran, Va. Bar No. 32438
Emily Christiansen, Va. Bar No. 48173
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Washington, DC 20006
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Fax: 202.719.7049

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2003, I caused to be served, *via* hand delivery, a copy of the foregoing Consolidated Motion For Leave To Record And Telecast Proceedings, as well as an accompanying memorandum of law and a proposed order, on the following:

Robert F. Horan, Jr.
Commonwealth's Attorney
4110 Chain Bridge Road
Fairfax, Virginia 22030

Michael S. Arif, Esq.
Mark J. Petrovich, Esq.
Thomas B. Walsh, Esq.
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**MEMORANDUM OF LAW IN SUPPORT OF CONSOLIDATED
MOTION FOR LEAVE TO RECORD AND TELECAST PROCEEDINGS**

Pursuant to Virginia Code § 19.2-266, (collectively, the "Movants"), submit this memorandum of law in support of their motion to allow the recording and telecast of certain pre-trial and trial proceedings in this matter.

Background

Movants are representatives of the electronic media who seek to cover certain pre-trial and the trial proceedings in this case. More broadly, Movants represent the public at large. Our country has an historical commitment to public access to judicial proceedings. The right of a "public" trial belongs not only to the accused, but to the public as well. The public's interest in asserting that right through its surrogate, the press, is particularly compelling in this case given the impact of the alleged crimes on the community, the age of the defendant, and the fact that he is eligible for the ultimate sanction of the state, the death penalty.

The October 2002 shooting deaths in Virginia, Maryland, and the District of Columbia profoundly affected a broad cross-section of citizens. These events touched not only the lives of citizens in the D.C. metropolitan area, but also persons throughout the nation, including those

directly affected in Alabama, Louisiana, and Washington State. There is a significant need for recording and telecast of these proceedings, because the physical confines of the courtroom and the importance of preserving order and decorum in the courtroom necessarily limit attendance. Without electronic coverage, the public will not be able to witness first-hand the orderly administration of justice in a case of keen interest and importance.

As the Virginia General Assembly has recognized, audio-visual coverage of judicial proceedings can be accomplished without prejudice to the parties, and without disruption or distraction. To permit recording and telecast, pursuant to the strict guidelines set forth in the Virginia Code, will serve the public interest in contemporaneous, complete, and objective information about the administration of justice in this case. In countless cases in Virginia, including numerous capital cases, electronic coverage of proceedings has served the public interest in a manner entirely consistent with the fair and uninterrupted administration of justice.

The Legal Standard

Public court proceedings are central to our justice system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (“[p]lainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials”). The presumption of openness of court proceedings “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

The Virginia Code reflects the long, unbroken history in the United States of conducting public trials, and, by allowing for the recording and telecast of court proceedings, embodies the

principle that the electronic media serves as an important surrogate for the public. Virginia Code § 19.2-266, which sets forth the framework for audio-visual coverage of court proceedings, provides in pertinent part as follows:

§ 19.2-266. Exclusion of persons from trial; photographs and broadcasting permitted under designated guidelines; exceptions

* * *

A court may solely in its discretion permit the taking of photographs in the courtroom during the progress of judicial proceedings and the broadcasting of judicial proceedings by radio or television and the use of electronic or photographic means for the perpetuation of the record or parts thereof in criminal and in civil cases, but only in accordance with the rules set forth hereunder.

Va. Code Ann. § 19.2-266.

The statute also sets forth specific guidelines—violations of which are punishable by contempt—which the legislature intended to ensure that electronic coverage does not negatively affect the proceedings, or in any way prejudice the parties. For instance, the presiding judge has the authority at any time to interrupt or terminate coverage. Va. Code Ann. § 19.2-266, Coverage Allowed (1). Coverage of proceedings for hearings on motions to suppress evidence is prohibited. Va. Code Ann. § 19.2-266, Coverage Allowed (2). Coverage of jurors is prohibited. Va. Code Ann. § 19.2-266, Coverage Allowed (4). Moreover, the guidelines provide that the location and operation of camera equipment, and the movements of media personnel, are not distracting. Va. Code Ann. § 19.2-266, Location of Equipment and Personnel (1-9).

A court may exercise its discretion and prohibit the recording and telecast of proceedings only upon a finding of “good cause.” Va. Code Ann. § 19.2-266, Coverage Allowed (1). A party opposing electronic coverage has the significant burden of demonstrating “good cause” that justifies prohibiting coverage. *Diehl*, 9 Va.App. at 197, 385 S.E.2d at 232. The “good cause”

standard cannot be met by conclusory allegations of prejudice. *Vinson v. Commonwealth*, 258 Va. 459, 470, 522 S.E.2d 170, 178 (1999) (on review of capital murder conviction, Virginia Supreme Court rejected defendant's "conclusory argument" that television cameras prejudiced defendant's "right to a fair and impartial jury" and found no abuse of discretion in permitting television cameras in courtroom); *Fisher v. Commonwealth*, 236 Va. 403, 410 n.2, 374 S.E.2d 46, 50 n.2 (1988) (on review of capital murder conviction, Virginia Supreme Court rejected defendant's "generalized objection" to cameras in the courtroom, and found no prejudice or infringement of the defendant's due process rights).

Nor can the "good cause" standard be met absent a concrete showing of prejudice that rises to a level of constitutional dimensions. *Stewart v. Commonwealth*, 245 Va. 222, 232-33, 427 S.E.2d 394, 402 (1993) (on review of capital murder conviction, no abuse of discretion to allow in-court television coverage of trial, where defendant failed to establish that cameras influenced outcome and therefore did not demonstrate that his due process rights had been violated); *Novak v. Commonwealth*, 20 Va.App. 373, 390-91, 457 S.E.2d 402, 410 (1995) ("[a]bsent a showing of prejudice of constitutional dimensions' . . . the mere presence of cameras does not result in an unfair trial") (citing *Chandler v. Florida*, 449 U.S. 560, 582 (1981)); *Diehl* 9 Va.App. at 197, 385 S.E.2d at 232 (video camera properly allowed at trial because testimony of experienced trial attorney that cameras "may" have an adverse effect upon the interest of the defendant, without further proof, failed to demonstrate "good cause" justifying exclusion). Significantly, no judgment in Virginia has ever been reversed because a judge allowed cameras in the courtroom pursuant to Virginia Code § 19.2-266.

ARGUMENT

I. Electronic Coverage Of These Proceedings Is Consistent With Virginia Law And Is In The Public Interest

As U.S. Attorney General John Ashcroft stated in his November 7, 2002 press conference, announcing the transfer of the defendant to this jurisdiction: “[f]or 23 days in October, our community lived in fear. Killers stalked the national capital area.” While the instant case involves a single murder, the crimes alleged touched citizens throughout Virginia, Maryland, and the District of Columbia, in their everyday lives, while sending children to school, filling their cars with gasoline, and shopping at suburban malls. The public interest in these crimes extended far beyond the boundaries of Fairfax County to the nation at large.

The keen interest of the majority of residents of the D.C. metropolitan area and the nation undoubtedly will persist through the administration of justice in this case. The broad scope of the crimes is reflected in the charges. Count I of the Commonwealth’s indictment alleges that the defendant “committed an act of terrorism.” Under this definition, our entire community is the “victim.” Moreover, the nationwide impact of the case broadens the scope of the public interest. Government authorities have alleged that this case is linked to other shootings in Alabama, Louisiana, and Washington State. These communities also have a direct interest in seeing the fair administration of justice in the case. Moreover, it is critically important for the public to be kept informed where the government is seeking to impose its ultimate sanction, the death penalty, on the accused.

Justice Oliver Wendell Holmes’ words of 1884 are still true today: “[i]t is desirable that the trial of causes should take place under the public eye . . . that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884). However, the many people touched by these crimes simply

cannot attend the court proceedings in person. Today, most citizens learn about the progress of criminal trials not by attending themselves, but through the news media. Accordingly, the United States Supreme Court has recognized the need for access by media representatives, who serve as surrogates for the public. *Richmond Newspapers*, 448 U.S. at 572-73 (approving practice of providing media representatives with “special seating and priority of entry so that they may report what people in attendance have seen and heard”) (citing *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976)).

While both print and electronic media serve that important surrogate role, only the electronic media has the ability to provide the public with a close visual and aural approximation of actually witnessing a trial without physical attendance. The General Assembly, through the enactment of Virginia Code § 19.2-266, and the Virginia Supreme Court, in cases such as *Stewart*, 245 Va. at 232-33, 427 S.E.2d at 402, have sanctioned meeting the public need for information about judicial proceedings through the vehicle of allowing for their recording and telecast.

This case is newsworthy, and will be extensively covered by the news media regardless of whether or not electronic journalists are permitted to utilize the tools of their trade inside the courtroom. But permitting recording and telecast, consistent with the Virginia statute, of the proceedings that take place inside the courtroom will ensure that the information conveyed by the news media to the public is contemporaneous, complete, and objective. Such coverage will convey the evidence as it is received in the courtroom setting – in a rational, dispassionate, and orderly manner. Without a camera in the courtroom as an objective observer, the public will be forced to rely upon the selective summaries of those members of the media who are able to secure a coveted spot in the courtroom. Conversely, electronic coverage of proceedings allows

citizens to have a first-hand view of the case as it proceeds under the control of the presiding judge, and allows them to make their own unfiltered assessments. Given the impact of the crimes alleged on the community at large, it is particularly important that, in order to understand whatever verdict is rendered, the same community be able to see and hear the case presented by the prosecution and the defense. As the Supreme Court noted, “[p]eople in an open society do not demand infallibility from their institutions but it [will be] difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers*, 448 U.S. at 527. Indeed, it is the presumptive constitutional right to observe criminal trials that is at the very heart of *Richmond Newspapers* and its progeny.

II. Under The Guidelines Of Virginia Code § 19.2-266, Coverage Will Be Unobtrusive And Consistent With The Rights Of The Parties

Movants seek an order that allows the audio-visual coverage of certain proceedings, consistent with Virginia Code § 19.2-266. Virginia’s experience has demonstrated that electronic coverage of court proceedings, pursuant to the statute, works to achieve the goals involved. Recording and telecast of court proceedings preserves the important public rights to access and information, without prejudicing the parties or disrupting the proceedings.

Movants understand that the legislature has sought to eliminate prejudice through the strictures of Virginia Code § 19.2-266. Under Section 19.2-266, the presiding judge has full authority at any time to interrupt or terminate coverage. In addition, the statute prohibits coverage of certain proceedings (such as hearings on motions to suppress evidence), and certain participants in the judicial process (such as jurors). Of course, Movants will abide by these restrictions. Given these restrictions, Virginia courts have made clear that a party opposing coverage must meet a heavy burden. Controlling law holds that speculation or generalized fears are not sufficient to overcome the presumption that electronic coverage will not prejudice the

parties. *Vinson*, 258 Va. at 470, 522 S.E.2d at 178; *Stewart*, 245 Va. at 232-33, 427 S.E.2d at 401-02; *Diehl*, 9 Va.App. at 197, 385 S.E.2d at 232.

Movants' request fully complies with the guidelines in Virginia Code § 19.2-266 that are intended to serve the court's interest in making media coverage unobtrusive. As provided in the statute, arrangements for the pooling of equipment and personnel for the electronic media shall be made through Ede Jermin of WRC(TV) NBC 4, who has been designated by the Virginia Association of Broadcasters as the coordinator for Fairfax County. The order sought by Movants would allow for audio-visual coverage from unobtrusive locations in the courtroom. The equipment that will be used is virtually silent and involves no distracting lights. Personnel involved in the electronic coverage would be fully apprised of and required to adhere to the strict guidelines of Virginia Code § 19.2-266. Given the safeguards provided by these well-established procedures, electronic coverage would not distract from the decorum of the proceedings.

In numerous cases, including cases involving capital murder charges, Virginia courts have allowed the recording and telecast of proceedings in a manner that ensures a fair trial. *See, e.g., Vinson*, 258 Va. at 471, 522 S.E.2d at 178; *Stewart*, 245 Va. at 232-33, 427 S.E.2d at 401-02; *Savino v. Commonwealth*, 239 Va. 534, 547 n.4, 391 S.E.2d 276, 283 n.4 (1990); *Fisher*, 236 Va. 403, 410 n.2, 374 S.E.2d 46, 50 n.2. Movants seek merely to employ the tested guidelines of Section 19.2-266 in order to meet the compelling need for information about the administration of justice in this case, which extends to citizens throughout this nation.

CONCLUSION

For the foregoing reasons, as well as those that may be offered at any hearing on the motion, Movants' consolidated motion for leave to record and telecast proceedings should be granted.

DATED: January 30, 2003

Respectfully submitted,

Radio-Television News Directors Association,
Virginia Association Of Broadcasters,
ABC, Inc.,
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